

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:

**PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE AND
INTRASTATE SURFACE WATERS,
20.6.4 NMAC**

No. WQCC 20-51 (R)

**TRIAD NATIONAL SECURITY, LLC
AND THE UNITED STATES DEPARTMENT OF ENERGY'S
EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED
STATEMENT OF REASONS AND FINAL ORDER**

Triad National Security, LLC ("Triad") and the United States Department of Energy, National Nuclear Security Administration ("DOE") (collectively "LANL"), pursuant to the Amended Procedural Order, issued October 26, 2021, hereby submit the following exceptions to the Hearing Officer's Report ("Report") and Attachment A to the Hearing Officer's Report ("Attachment A"), submitted November 8, 2021.

I. EXCEPTIONS TO "THE MAJOR ISSUES" SECTION OF REPORT AND CORRESPONDING SECTIONS OF ATTACHMENT A

A. Classification of LANL Waters

1. Report, page 11, paragraph 3.¹ This paragraph summarizes NMED's proposal to create a new classified water of the state, section, 20.6.4.140 NMAC ("Section 140"), and reclassify certain intermittent waters currently classified under 20.6.4.128 NMAC ("Section 128") under that section based upon data collected pursuant to the Joint Stipulation. However, the Report does not include LANL's partial opposition to NMED's proposal for Section 140. To remedy the oversight, LANL requests the following amendment shown in underline below:

As an outcome of a Joint Stipulation Regarding Proposed Changes to 20.2.4.128 NMAC, several Hydrology Protocol surveys were performed on waters at the Los

¹ LANL's exceptions to the Report refer to the PDF page number.

Alamos National Laboratory (“LANL”) to determine the appropriate protections for those waters. Based upon the data collected in those surveys by the parties to the Joint Stipulation, NMED proposed to create a new Section, 20.6.4.140 NMAC, breaking out certain intermittent waters within LANL from 20.6.4.128 NMAC, and amending 20.6.4.128 NMAC accordingly. LANL generally supported NMED’s proposed reclassification under new Section 140, but with two exceptions. First, LANL recommended that the Commission not reclassify Effluent Canyon within Section 140 until such time as new data can be collected and analyzed. Second, LANL proposed that the portion of Twomile Canyon to be included in new Section 140 should terminate at stream gage E244, rather than the confluence of Twomile Canyon with Pajarito Canyon.

2. Report, page 11, paragraph 4. The summary provided in this paragraph of LANL’s proposal to amend section 20.6.4.126 NMAC (“Section 126”) to identify certain additional perennial stream segments within lands managed by LANL does not accurately reflect LANL’s position. For example, as presented in LANL’s Closing Argument and Proposed Statement of Reasons, LANL opposes the contention set forth in this paragraph that Section 128 waters found to be perennial are “no longer classified in [Section 128] by the plain language of that Section” and pointed out that NMED has not supported the contention that classified waters may be declassified automatically or declassified unilaterally by NMED, without a Commission decision. *See* LANL’s Closing Argument at 16-23; LANL’s Closing Argument, Exhibit B, LANL’s Proposed Statement of Reasons (“LANL’s Proposed Statement of Reasons”), ¶¶ 169-184. To accurately reflect LANL’s position, LANL requests that the paragraph be modified as shown below in underline and strikeout:

LANL proposed their own amendments to 20.6.4.126 NMAC, asserting that ~~the~~ waters ~~previously~~ currently classified in 20.2.4.128 NMAC but ~~subsequently~~ recently found to be have perennial characteristics ~~(and therefore no longer classified in 20.6.4.128 NMAC by the plain language of that Section)~~ should be classified in 20.6.4.126 NMAC. ~~NMED’s position is that while LANL has a right to petition the Commission for an amendment to a designated use, LANL must complete a use attainability analysis prior to a hearing. As this critical step was not taken, the proposed amendment fails as a matter of law.~~ NMED contends that these waters cannot be moved from Section 128 to Section 126 because the waters have already been automatically declassified to Section 99. Therefore, according to

NMED, the waters cannot be moved from Section 99 to Section 126 without completion of a use attainability analysis. LANL responded that no use attainability analysis is required because the newly identified perennial segments in question are a portion of ephemeral or intermittent waters currently classified under Section 128 – the Commission has made no decision to segment these waters and declassify a portion of them to Section 99 – and the designated uses of all waters classified in Section 128 were previously analyzed by NMED’s 2007 use attainability analysis.

3. Attachment A, pages 95-98. These pages discuss proposals related to Section 126, Section 128, and Section 140, under the combined header “20.6.4.126, 128, and 140 NMAC – Perennial, Ephemeral and Intermittent, and Specified Intermittent Waters Within LANL.” Proposals related to Section 128 and Section 140 are also separately discussed in subsequent sections of Attachment A, on pages 98-99 and 101-103.² For clarity, LANL requests that Attachment A be revised such that proposals related to Section 126 are discussed in a standalone section. Specifically, the current discussion on pages 95-98 should be modified to start with a description of LANL’s proposal to amend Section 126, followed by a summary of NMED and any other parties’ positions regarding LANL’s proposal, followed by proposed alternative findings for the Commission to adopt or reject LANL’s proposal. As discussed below in LANL Exception Nos. 4 and 5, LANL also requests that: (1) the description of LANL’s proposal for Section 126 that is currently contained in paragraph 3, on pages 95-97, be amended to more accurately summarize LANL’s position; and (2) the alternative findings that are currently contained in paragraph 5, on pages 97-98, be revised to clarify that the Commission need not choose between

² LANL is concerned that, as currently written, the combined discussion of Section 126, Section 128, and Section 140 proposals on pages 95-98 may cause confusion. For instance, the first and second numbered paragraphs on page 95 describe NMED’s proposal for Section 140, but that proposal is then also discussed, in more detail, on pages 101 through 103. The third numbered paragraph on page 95 then discusses LANL’s proposal for Section 126, which is not directly related to NMED’s proposal for Section 140. The fifth numbered paragraph – the alternative proposed findings for the Commission – implies that the Commission must choose between adopting NMED’s proposal for Section 140 and LANL’s proposal for Section 126, which is not accurate.

adopting LANL's proposal for Section 126 and NMED's proposal for Section 140. *See* LANL Exception No. 4; LANL Exception No. 5.

4. Attachment A, pages 95-96, paragraph 3. This paragraph describes LANL's proposal to amend Section 126 to identify certain additional perennial stream segments within LANL. However, the paragraph does not capture the central disagreement between NMED and LANL regarding LANL's proposal. Namely, NMED's contention that the segments within Section 128 discovered to have perennial characteristics (*i.e.* Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kieling Spring) cannot be moved to Section 126 because they have allegedly been automatically unclassified to Section 99, without a Commission decision and without any notice or locational information (e.g., starting point or terminus) to LANL or other stakeholders. LANL's position is that the segments in question are not classified under Section 99 because Section 99 only includes perennial waters of the State that have not been previously classified, and the segments were classified by the Commission under Section 128 during the 2003 Triennial Review, and the Commission has made no decision to declassify those waters since that time. To address this issue, LANL proposes that the following discussion be added immediately following the discussion of LANL's proposal for Section 126, what is currently paragraph 3 on page 95:

NMED contends that the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kieling Spring cannot be reclassified from Section 128 to Section 126 because the waters have already been automatically declassified to 20.6.4.99 NMAC ("Section 99"). LANL's position is that the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kieling Spring are not unclassified waters of the State subject to Section 99. The segments were classified by the Commission under Section 128 during the 2003 Triennial Review, and approved by the U.S. Environmental Protection Agency, and the Commission has made no decision to declassify those waters since that time. LANL contends that only the Commission has the authority to modify the state's water quality standards, and previously classified segments cannot be unclassified automatically or by a decision of NMED

without a Commission decision. See NMSA 1978, § 74-6-3(E); 20.6.4.7(C)(3) NMAC.

LANL also urges the Commission to reject NMED's position that an illustrative flowchart in the WQMP/PPP requires the automatic declassification of previously classified waters of the State. The illustrative flowchart on its face states that it merely depicts "the *primary pathways* to determining or amending the applicable water quality standards based upon . . . Hydrology Protocol results." See Hrg. Tr., Vol. IV, 1143:5-12 (Meyerhoff) (emphasis added). The flow chart does not give NMED any authority to declassify previously classified waters. See Hrg. Tr., Vol. IV, 1148:1-4 (Meyerhoff). Nor does the flow chart prevent the Commission from adopting LANL's proposal to reclassify those portions of Section 128 waters discovered to be perennial under Section 126.

LANL also asserts that its proposal to move the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring from Section 128 to Section 126 is the most logical approach, as these segments are contiguous with existing perennial waters within LANL that are already classified under Section 126. Hrg. Tr., Vol. IV, 1330:10-1331:5 (Meyerhoff). Classification of the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring under Section 126 is also consistent with the designated uses under Section 126, which, like Section 128, include secondary contact. See 20.6.4.126 NMAC; 20.6.4.128 NMAC. NMED's 2007 UAA concluded that all waters classified in Sections 126 and 128 following the 2003 Triennial Review – including the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring – have an existing and attainable designated use of secondary contact. See LANL Ex. 18 (NMED UAA, 2007). LANL demonstrated that secondary contact remains the appropriate recreational use for the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring, because the shallow nature of those segments precludes primary contact. See Hrg. Tr., Vol. IV, 1086:11-15 (Meyerhoff). NMED has provided no basis to believe that the water quality for the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring differs from the water quality for the segments of the same canyon that have already been classified under Section 126.

5. Attachment A, page 96, paragraph 5. This paragraph contains proposed alternative findings for the Commission related to NMED's proposal for Section 140 and LANL's proposal for Section 126. As discussed above, LANL requests that pages 95-98 of Attachment A be revised such that LANL's proposal for Section 126 is addressed in a standalone section and not combined with a discussion of proposals related to Section 128 and Section 140. See LANL Exception No.

3. Consistent with that request, LANL recommends that this paragraph be revised to make clear that the Commission need not choose between adopting NMED's proposal for Section 140 and LANL's proposal for Section 126. LANL proposes that the current proposed alternative findings in paragraph 5 be modified as shown below:

~~Based on the weight of the evidence, the Commission finds the Department's proposal to create new Section 20.6.4.140 NMAC and amend 20.6.4.128 NMAC accordingly is well taken and adopts the Department's amendments to these sections as proposed;~~

~~OR,~~

The Commission finds that LANL's proposed revisions to Section 126 are well taken and supported by the weight of the evidence. The Commission hereby adopts such changes as reflected in the Proposed Final Rule submitted by LANL. The Commission finds that the most reasonable and logical approach is the approach proposed by LANL to move the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring from Section 128 to Section 126. These segments are contiguous with existing perennial waters within LANL that are already classified under Section 126. Classification of the Pajarito Upper Section, Pajarito Lower Section, and Arroyo de la Delfe from Pajarito canyon to Kielling Spring under Section 126 is also consistent with the designated uses under Section 126, which include secondary contact. The Commission further directs NMED to develop a proposed amendment to the illustrative flowchart in the WQMP/CPP consistent with LANL Ex. 78 (LANL's Recommendations to Flow Chart) to clarify the purpose and effect of the flowchart and ensure that it avoids automatic declassification of any classified State waters and includes a Commission decision-making role for every designated use change. The Commission will consider that amended flowchart in a future amendment to the WQMP/CPP.

OR,

The Commission rejects LANL's proposed amendments to Section 126.

B. Process for Reviewing and Amending the Standards

6. Report, page 11, last paragraph. This paragraph discusses LANL's request that the Commission adopt a formal process in the Standards or the WQMP/CPP for determining existing uses and for reclassifying a water to assign a more protective designated use. The paragraph states that the federal Clean Water Act does not establish what information must be developed to support these use decisions nor what procedure to apply but does not address LANL's position that EPA guidance instructs how an existing use should be evaluated, and that the existing use analyses that

NMED performed for this Triennial Review did not meet the minimum requirements set forth in that guidance. Nor does the paragraph identify LANL's proposed five-step process, which is consistent with the federal guidance, for the Commission to include in its adoption of a formal existing use analyses process. To address this issue, LANL recommends that the last paragraph be modified as shown below in underline and strikeout:

LANL contends that the process for reviewing and amending the WQS should include a process for determining existing uses and more protective designated uses. The federal provisions of the Clean Water Act do not establish what information must be developed to support these use decisions nor what procedure to apply. However, there is federal guidance that instructs how an existing use should be evaluated. ~~For example,~~ LANL asserts that during this Triennial Review, for the first time and without any established process in the WQS, NMED applied an existing use demonstration to re-examine secondary contact recreational uses for certain water bodies and to re-examine aquatic life uses for certain waters within LANL. Therefore, LANL requests the Commission formally adopt procedures in the Standards or the WQMP/CPP procedures for determining existing uses and for reclassifying a water to assign a more protective designated use, for clarity, transparency, and to ensure proper decision-making. ~~either in the Standards or the WQMP/CPP. LANL has proposed a specific five-step process that it recommends the Commission include in those procedures.~~

7. Attachment A, page 82, paragraph 2. This paragraph discusses LANL's objections to NMED's proposed amendments to "selected sections that contain secondary contact uses." The paragraph touches on several distinct issues, including LANL's request that the Commission adopt a formal process for determining existing uses and for reclassifying a water to assign a more protective designated use, and LANL's specific objections to the existing use analyses performed by NMED for this Triennial Review (*i.e.*, the Recreational EUA and the LANL EUA). However, the discussion is incomplete and combining the discussion on these distinct issues may result in confusion. To avoid the confusion, LANL recommends that this discussion be amended as shown below in underline and strikeout:

LANL objected to certain of the Department's proposed amendments. LANL Exhibit 58, pp. 5-12 (2020 TR LANL-01083 - 01090). Tr. Vol. 4, 1080:9-1099:14.

~~(See .126, .128, and .140 below).~~ Of greatest concern to LANL is that NMED is ~~proposing to modify the applicable recreational use from secondary contact to primary contact on in Section 103, 116, 204, 206 and 207 waters based solely on a review of available water quality data for Escherichia coli (“E. coli”), pH, or both.~~ Specifically LANL contends, the process and evidentiary requirements to reclassify a water to assign a more protective designated use or establish an existing use are not set out in the Standards and remain unclear. **LANL Ex. 2** at 25 (Meyerhoff Direct).; see Hrg. Tr., Vol. III, 928:25-929:4 (Aranda) ~~(confirming “there are no regulations prescribing how a state determines existing uses.”).~~ During this Triennial Review, for the first time and without any established process in the WQS, NMED applied an “existing use demonstration” to re-examine secondary contact recreational uses for certain water bodies and to re-examine aquatic life uses for certain waters within LANL. **NMED Ex. 56** (Recreational EUA) and **NMED Ex. 73/Ex. 124** (LANL EUA). The process NMED used to develop these existing use demonstrations was unclear and did not involve stakeholder participation. Indeed, interested LANL stakeholders were not provided a copy of the LANL EUA, **NMED Ex. 73**, until May 3, 2021, when NMED filed its pre-filed direct testimony with NMED’s Notice of Intent to Present Technical Testimony (“NMED NOI”) in this the Triennial Review. Hrg. Tr., Vol. IV, 1316:19-22 (Fullam). LANL was not provided an opportunity to comment on **NMED Ex. 73** or the data NMED relied on to support it until LANL filed its pre-filed rebuttal testimony in the Triennial Review proceedings. Hrg. Tr., Vol. IV, 1316:23-1317:8 (Fullam); see Hrg. Tr., Vol. IV, 1115:4-15 (Gallegos). Consequently, LANL had no opportunity to raise data quality concerns with NMED concerning Effluent Canyon (among other data relied on in **NMED Ex. 73**) and NMED acknowledged that it “inadvertently overlooked” this water quality data demonstrating that the marginal warmwater aquatic life use designation may not be appropriate. Hrg. Tr., Vol. IV, 1297:21 (Fullam). These existing use demonstration efforts and NMED’s associated testimony demonstrate the critical need for the Commission to formally adopt procedures either in the Standards or the WQMP/CPP.

For clarity, transparency, and to ensure proper decision-making, LANL has requested that the Commission formally adopt procedures in the Standards or the WQMP/CPP for determining existing uses and for reclassifying a water to assign a more protective designated use. LANL has proposed a five-step process that it recommends the Commission include in those procedures. Those five-steps are as follows: (1) develop a Work Plan; (2) implement the existing use investigation by compiling existing data, as required by the Work Plan, and collecting additional data, where necessary, to fill critical data gaps; (3) conduct the existing use analysis to determine is if a higher attainable use is applicable to the waterbody; (4) prepare and submit a petition to the Commission to modify the designated uses or uses for the studied waters, if warranted by the analysis; and (5) if the EUA is approved by the Commission, the revised water quality standards and all supporting evidence would be submitted to the EPA Regional Administrator for review and approval. See LANL Ex. 2 at 33-34 (Meyerhoff Direct); LANL Ex. 58 at LANL-01099-

01101 (Meyerhoff Rebuttal); Hrg. Tr., Vol. IV, 1086:20-1087:24, 1090:6-1092:8 (Meyerhoff).

LANL notes that, while there are no federal Clean Water Act regulations that proscribe how a State should determine existing uses, there is federal guidance that provides instruction for how a State should evaluate existing uses. See e.g., LANL Ex. 32, Attachment at 1 (EPA “Smithee Letter”); LANL Ex. 58 at LANL-01086 (Meyerhoff Rebuttal); LANL Ex. 67 at 9 (EPA Water Quality Standards Handbook, Chapter 2). Specifically, EPA has instructed that a State “should determine existing uses on a site-specific basis to ensure it has identified the highest degree of uses and water quality necessary [to protect] the uses.” LANL Ex. 32 at LANL-00568 (EPA “Smithee Letter”); LANL Ex. 2 at 29 (Meyerhoff Direct). Accordingly, an existing use evaluation should include both an evaluation of the use of the water (e.g., its purpose such as swimming) and of the water quality necessary to support the use. LANL Exhibit 32 at LANL-00568 – 00569 (EPA “Smithee Letter”).

LANL contends that neither of NMED’s existing use demonstrations performed for this Triennial Review meet EPA’s minimum requirements and should not be adopted by the Commission. With respect to the Recreational EUA, specifically, LANL’s greatest concern is that NMED is proposing to modify the applicable recreational use from secondary contact to primary contact on Section 103, 116, 204, 206 and 207 waters based solely on a review of available water quality data for *Escherichia coli* (“*E. coli*”), pH, or both. EPA has directed that States are to consider both the actual use of the water and the water quality, but NMED relied almost exclusively on water quality to amend the recreational use from secondary to primary. See Hrg. Tr., Vol. IV, 1208:3-8 (DeRose-Bamman). LANL Ex. 58 at LANL-01085 (Meyerhoff Rebuttal) (“NMED is proposing that considerations regarding the actual use of the water (e.g., swimming or wading) either need not be evaluated at all, or can be determined based on anecdotal information and not waterbody-specific data. NMED’s proposed approach is contrary to the intent of the federal law.”). Furthermore, during the 2013 Triennial Review, the Commission rejected a similar NMED proposal to assign primary contact use to the segments that are the subject of the Recreational EUA (NMED Ex. 56) because NMED failed to provide evidence of an actual use of the water necessary to support a primary contact use designation. See LANL Ex. 58 at LANL-01089 (Meyerhoff Rebuttal); Hrg. Tr., Vol. IV, 978:11-981:8, 16 (Aranda). LANL contends that NMED’s current existing use demonstrations are similarly flawed because they once again do not include an evaluation of the actual use of the water. See Hrg. Tr., Vol. IV, 985:23-986:16 (Aranda).

8. Attachment A, pages 85-86, paragraph 2. This section discusses NMED’s proposed amendments to 20.6.4.108, 20.6.4.115, 20.6.4.206, 20.6.4.208, 20.6.4.209, 20.6.4.215, 20.6.4.220, 20.6.4.307 and 20.6.4.309 NMAC, but Paragraph 2 does not reflect LANL’s position. LANL has

not opposed the Department's proposed amendments to 20.6.4.108, 20.6.4.115, 20.6.4.206, 20.6.4.208, 20.6.4.209, 20.6.4.215, 20.6.4.220, 20.6.4.307 and 20.6.4.309 NMAC. LANL's witnesses discussed NMED's Recreational EUA (NMED Ex. 56) as an example of NMED's flawed existing use demonstrations and the need for the Commission to adopt a clear process for determining existing uses or more protective designated uses. Accordingly, LANL recommends that the Hearing Officer amend this paragraph as shown below in underline and strikeout:

LANL objected to certain of did not object to the Department's proposed amendments to 20.6.4.108, 20.6.4.115, 20.6.4.206, 20.6.4.208, 20.6.4.209, 20.6.4.215, 20.6.4.220, 20.6.4.307 and 20.6.4.309 NMAC. LANL contends that the Department's LANL Exhibit 58, pp. 5-12 (2020 TR LANL 01083 – 01090). Tr. Vol. 4, 1080:9-1099:14. As demonstrated by the shortcomings of the two existing use analysis demonstration documents, NMED Ex. 56 (Recreational EUA), NMED Ex. 73 and NMED Ex. 124 (LANL EUA), are flawed and do not meet the requirements of applicable federal guidance. See LANL Exhibit 58, pp. 5-12 (2020 TR LANL-01083 - 01090); Tr. Vol. 4, 1080:9-1099:14. NMED does not have a clear process for determining existing uses or more protective designated uses. Hrg. Tr., Vol. III, 928:25-929:4 (Aranda) (confirming "there are no regulations prescribing how a state determines existing uses."). The ad hoc nature of NMED's existing use approach was most apparent in the context of NMED's response to the parties' identification of certain perennial characteristics in classified Section 128 waters, as described in Section I.C, above. Accordingly, as discussed above, LANL has requested that the Commission formally adopt procedures in the Standards or the WQMP/CPP for determining existing uses and for reclassifying a water to assign a more protective designated use.

C. Compliance with the WQS (20.6.4.12(E) & 20.6.4.14(A) NMAC)³

9. Attachment A, pages 58-59, paragraph 3; pages 69-70, paragraph 1. These paragraphs address LANL's proposed amendment to 20.6.4.14(A) NMAC. These paragraphs identify LANL's proposed changes to 20.6.4.14(A) NMAC but do not include the principal basis for LANL's proposal to conform New Mexico WQS requirements for analytical methods and use of analytical methods for compliance purposes to federal law. *See, e.g.,* LANL's Closing

³ Section II(C) below separately addresses LANL's exceptions to the notice discussion on Attachment A page 60, paragraph 8 and page 70, paragraph 2.

Argument at 46; LANL's Proposed Statement of Reasons, at ¶¶ 106-111. Additionally, the summary of LANL's proposed changes does not reflect the scope of LANL's proposal, clarified in LANL's post hearing submittals based on testimony from LANL witness Dr. Toll.

To address this, LANL recommends adding the following language at the end of paragraph 3 on page 61 and at the end of paragraph 1 on page 70:

LANL witness Dr. Toll explained that these amendments seek to conform New Mexico WQS requirements for analytical methods and use of analytical methods for compliance purposes to federal law. The anticipated effect of these changes is (1) elimination of ambiguity about compliance monitoring obligations and (2) clarification to how the Commission's numeric criteria should be applied in situations where the criterion is less than the lowest minimum level of the required method. LANL Ex. 7 at 5, 9 (Toll Direct).

Dr. Toll explained on cross examination, LANL's proposal to conform New Mexico WQS requirements for analytical methods to federal law does not address analytes with no approved Part 136 method and is thus consistent with the EPA regulation allowing EPA or NMED to select a test method for analytes that do not have an approved Part 136 method. Hrg. Tr., Vol. III, 771:20-772:4, 777:6-16 (Toll). See also 40 C.F.R. § 122.44(i)(1)(iv)(B) ("Where no other EPA-approved methods exist, the Director should select a method consistent with 40 C.F.R. § 122.44(i)(1)(iv)(B).").

Dr. Toll also testified that LANL's proposal does not address or seek to impede NMED's ability to apply for approval of an alternative test method under the defined process in Part 136 for analytes with an approved Part 136 method. Hrg. Tr., Vol. III, 772:5-14 (Toll). Dr. Toll clarified that LANL is only proposing to require Part 136 approved methods for NPDES compliance and Section 401 state certifications. Hrg. Tr., Vol. III, 766:7-13 (Toll). LANL's proposal does not affect the monitoring methods that may be used for non-enforcement purposes.

10. Attachment A, page 71, paragraph 3. The paragraph summarizes Amigos Bravos' opposition to LANL's proposed amendments to 20.6.4.14(A) NMAC without addressing the contrary evidence provided by LANL. To address this matter, LANL requests that the following discussion be added in a new paragraph following paragraph 3 on page 71:

LANL witness Dr. Toll testified that Amigos Bravos witness Conn's argument is normative and not based on the authority that states have. Hrg. Tr., Vol. III, 772:17-19 (Toll). The Commission acknowledges that EPA chose not to approve Method

1668C for use in compliance monitoring or 401 certifications in its 2010, 2017, and 2021 Method Update Rules. *Id.* at 773:22-774:3. As articulated by Dr. Toll, “Method 1668C is not a Part 136 approved method so it’s not allowed for compliance monitoring or 401 certification unless an application for limited use approval has been filed and approved in accordance with 40 C.F.R. Section 136.5 and requirements for establishing equivalent performance at 136.6(b)(2)(i) have been met.” *Id.* at 774:17-23.

Additionally, LANL disagrees that the statements in paragraph 3 that “Mr. Toll’s legal analysis is wrong, and his own exhibits demonstrate that states have the authority under the Clean Water Act to select non-Part 136 sampling methods if there is no Part 136 Method that applies” reflect the federal law or accurately characterize LANL’s proposal. Rather, as Dr. Toll clarified on cross-examination and as addressed in LANL’s post hearing submissions:

LANL’s proposal to conform New Mexico WQS requirements for analytical methods to federal law does not address analytes with no approved Part 136 method, but is entirely consistent with the EPA regulation allowing EPA or NMED to select a test method for analytes that do not have an approved Part 136 method. Hrg. Tr., Vol. III, 771:20-772:4, 777:6-16 (Toll); *see also* 40 C.F.R. § 122.44(i)(1)(iv)(B) (“Where no other EPA–approved methods exist, the Director should select a method consistent with 40 C.F.R. § 122.44(i)(1)(iv)(B).”). LANL’s proposal likewise does not address or seek to impede NMED’s ability to apply for approval of an alternative test method under the defined process in Part 136. Hrg. Tr., Vol. III, 772:5-14 (Toll). Finally, to be clear, LANL is only proposing to require Part 136 approved methods for NPDES compliance and Section 401 state certifications. Hrg. Tr., Vol. III, 766:7-13 (Toll). LANL’s proposal in no way affects the monitoring methods that may be used for non-enforcement, or general monitoring, purposes.

LANL Closing Argument at 47. To conform the statement with LANL’s position and Dr. Toll’s testimony, LANL requests that the statement in paragraph 3 be struck, or in the alternative, that the paragraph be modified to clarify paragraph 3 is merely a summary of Amigos Bravos’ arguments.

II. EXCEPTIONS TO OTHER ISSUES IN THE REPORT AND ATTACHMENT A

A. 20.6.4.7.A(8) Definition of Attainable Use

11. Attachment A, Page 7, paragraph 2. This paragraph states that LANL “objected to the inclusion of the word ‘use’” in the definition of “Attainable Use,” but does not fully reflect LANL’s position stated in its post hearing submission. Specifically, paragraph 2 does not state that LANL withdrew this objection to the inclusion of the word “use” and proposed a revised definition in response to testimony from NMED witness Fullam. To address this matter and clarify LANL’s revised proposal, LANL proposes to modify paragraph 2 as shown below in underline and strikeout:

LANL initially objected to the inclusion of the word “use” as it would limit the term to uses that are achievable by the imposition of effluent limits. ~~LANL further argued that this~~ At hearing, in response to Ms. Fullam’s testimony, LANL withdrew its objection to the word “use” in its Proposed Statement of Reasons but maintained its objections to the definition proposed by NMED because NMED’s proposal excludes many of the factors that prevent attainment of a use in 40 C.F.R. 131.10(g). In its post hearing submission, in response to testimony from NMED, LANL revised its proposed definition of attainable use as follows~~amendment~~:

B. 20.6.4.11(G) NMAC- Human Health-Organism Only Criteria

12. Attachment A, Page 56-57, paragraphs 1-3. These paragraphs discuss LANL’s proposed changes to 20.6.4.11(G) NMAC, but do not reflect the discussion in LANL’s post hearing submissions regarding how not applying HH-OO criteria in fishless tributaries could still be protective of downstream uses. LANL requests that Attachment A, page 56, paragraph 1 be revised to include the following discussion from Paragraph 94 of LANL’s Proposed Statement of Reasons:

Mr. Fulton explained that, in designating uses of a water body and the appropriate criteria for those uses, 40 C.F.R. Section 131.10(b) requires New Mexico, “to take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.” Mr. Fulton thus explained that “as long as fish consumption and HH-OO criteria are being met in downstream waters, there are situations where modifying or removing HH-OO criteria in tributaries would still be protective of downstream users and consistent with federal regulations.

Similarly, where the tributary flow does not have reasonable potential to cause or contribute to the downstream failure to meet the HH-OO criteria, modifying or removing HH-OO criteria in tributaries would still be protective of downstream uses and consistent with federal regulations. LANL Ex. 62 at 15-16 (Fulton Rebuttal).

LANL further recommends that the following discussion from Paragraphs 98, 99, and 100 be added after paragraph 3 on page 57:

At hearing, Mr. Fulton first addressed the objection that New Mexico does not have a ‘fish consumption’ designated use explaining that “The purpose of HH-OO criteria is specifically to protect against the consumption of fish or shellfish; that is, fish consumption is the sole route of exposure used in the calculation of HH-OO criteria. And so, while the WQS do not define “fish consumption” as a designated use, HH-OO criteria are derived, and intended, to explicitly to protect this use.” Hrg. Tr., Vol. III, 812:1-7 (Fulton).

Mr. Fulton then explained that in the case where a fishless tributary may not meet the HH-OO criteria, but the downstream waters may meet the HH-OO criteria, “the tributary would be 303(d)-listed and NMED would need to develop a TMDL and load allocation to protect a beneficial use that does not exist in the tributary.” Hrg. Tr., Vol. III, 813-14 (Fulton). Similarly, in a case where “the downstream water may not meet the HH-OO criterion due to upstream sources, or sources unrelated to a given tributary, and that tributary may have no reasonable potential to cause or contribute to this exceedance . . . the tributary would be 303(d)-listed and targeted for a load allocation/TMDL to mitigate a non-existing source, or a source that does not contribute to the HH-OO exceedance in the downstream water.” Mr. Fulton testified that this would be a misuse of NMED resources.” Hrg. Tr., Vol. III, 814:6-7 (Fulton).

Finally, Mr. Fulton explained that LANL’s objective is to allow for exceptions on a site-specific basis “if a demonstration could be made to the satisfaction of the Commission and following review from the Department and the public that all actual existing or attainable uses are protected in both the tributary and the downstream water.” Hrg. Tr., Vol. III, 814:8-16 (Fulton).

C. Sufficiency of Public Notice of LANL’s Proposed Amendments

13. The Hearing Officer’s Report references NMED’s argument that the public could not have reasonably anticipated the adoption of amendments proposed by LANL (*see, e.g.*, Attachment A, page 60-61, paragraph 8; page 70, paragraph 2), but does not provide LANL’s position to the contrary, fully briefed at pages 62 through 64 of LANL’s Closing Argument. To

address this matter, LANL recommends that the Report be modified to include the following discussion at Attachment A, page 61, following paragraph 8, and also at page 70, following paragraph 2:

LANL objects to NMED's position and argues instead that interested parties and the public had sufficient notice of LANL's Proposed Changes and opportunity to present evidence and cross examine witnesses on proposed changes at hearing. Specifically, LANL pointed to the express language in the Public Notice of Hearing directing all interested persons to "visit the WQCC website prior to the hearing for any updates," as putting all interested parties on notice that additional changes may be proposed prior to hearing. *Id.* LANL also stated that LANL's proposed changes to 20.6.4.12(E) NMAC, 20.6.4.14(A) NMAC and 20.6.4.7(S) NMAC are within the noticed scope of "proposed amendments to 20.6.4 NMAC" and were expressly stated in: LANL Exhibit 1 to LANL's Notice of Intent to Present Technical Testimony, filed with the Commission on May 3, 2021 and posted to the Commission's public website; and LANL Exhibit 57 to LANL's Notice of Intent to File Rebuttal Technical Testimony, filed with the Commission on June 22, 2021 and also posted on the Commission's website providing actual notice to interested persons. LANL also noted that the transcript of this proceeding establishes that all parties and members of the public were provided an opportunity at hearing to cross examine LANL witnesses on LANL's proposed changes. See, e.g., Hrg. Tr., Vol. III, 807:18-21 (Chakalian) (asking if there is a Commissioner or member of the public "that has cross-examination for Dr. Toll").

D. Clarification of When a Party is Being Quoted

14. Report, page 13, paragraph 2. This paragraph explains that the Hearing Officer used the phrase "to wit" within Attachment A to signal that the language that follows is quoted from the parties' respective closing arguments and proposed statement of reasons. For greater clarity, LANL recommends that the Hearing Officer instead use either quotation marks or indented block quotations to indicate where a parties' position is being quoted. LANL believes that the use of the phrase "to wit" makes it unclear exactly what language is being quoted. For instance, where the phrase is followed by multiple sentences, it is unclear whether only the sentence introduced with the phrase "to wit" is a quotation of a party's position, or whether every sentence that follows is a quotation as well. It is also unclear whether citations and authorities provided in support of a

given statement are included with the parties' quotation, or whether those citations and authorities are provided by the Hearing Officer.

E. Consistent Inclusion of Party Findings in Opposition to NMED Proposal

15. Attachment A. LANL recommends that where a specific reasoning or argument is provided in support of a proposed finding for the Commission, the reasoning or argument should also be identified within the Hearing Officer's summary of the parties' respective positions in the proceeding paragraphs of a given section within Attachment A. Where a specific reasoning or argument is identified for the first time in a proposed finding, without any prior discussion, it may cause confusion for the Commission. For example, the following proposed findings for the Commission reflect party reasoning or arguments that are not introduced in the proceeding paragraphs setting forth the parties' respective positions: Attachment A, page 16, fifth numbered paragraph (definition of Effluent Dominated); Attachment A, page 21-22, ninth numbered paragraph (definition of Emerging Contaminant); Attachment A, page 37-38, ninth numbered paragraph (definition of Toxic Pollutant); Attachment A, page 67-68, eleventh numbered paragraph (Toxic Pollutants); Attachment A, page 85, sixth numbered paragraph (Amendments to Selected Sections that Contain Secondary Uses); Attachment A, page 97-98 (Perennial, Ephemeral and Intermittent, and Specified Intermittent Waters Within LANL).

F. The Report's List of LANL Witnesses is Incomplete

16. Report, page 7, first unnumbered paragraph. This paragraph identifies witnesses that LANL presented during the Triennial Review hearing, but does not include Nancy L. Judd, and omits a description of Dr. John Toll's occupation. To correct this oversight, LANL proposes that the paragraph be amended as shown below in underline and strikeout:

Triad National Security, LLC was represented by Louis W. Rose and Kari Olson of Montgomery and Andrews, Alexander Arensberg and Carolyn L. McIntosh of Squire Patton Boggs LLP, and Maxine McReynolds, Office of Laboratory Counsel, Los Alamos National Laboratory. The U.S. Dept. of Energy (collectively “LANL”) was represented by Silas DeRoma and Stephen Jochem. LANL presented the testimony of Dr. Richard Meyerhoff, a senior water quality specialist, Robert Gallegos, an environmental professional, Timothy Goering, an environmental professional, Dr. D. Bryan Dail, an environmental scientist, Barry Fulton, an environmental scientist, Dr. John Toll, an environmental scientist, and David DeForest, an environmental toxicologist, and Nancy Judd, an environmental toxicologist.

For the reasons stated above, LANL requests that the Hearing Officer’s Report and Attachment A to the Hearing Officer’s Report be revised in accordance with the above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2021, a true and correct copy of the foregoing *Triad National Security, LLC and the United States Department of Energy's Exceptions to the Hearing Officer's Proposed Statement of Reasons and Final Order* was served via electronic mail to the following:

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